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# **In the Supreme Court of the United States**

OCTOBER TERM, 1944

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No. 520

FRED G. DRUMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINIONS BELOW**

The district court did not write an opinion. Its findings of facts, conclusions of law, and judgment appear in the record at pages 54-59. The opinion of the circuit court of appeals (R. 85-90) is not yet reported.

## **JURISDICTION**

The judgment of the circuit court of appeals was entered on August 1, 1944 (R. 90-91). The petition for rehearing was denied on August 28, 1944 (R. 119). The petition for a writ of cer-

tiorari was filed on September 30, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether a decree of a state court, ordering foreclosure of a mortgage executed by an Osage Indian and entered in a proceeding to which the United States was not a party, is a bar to this suit by the United States to have the mortgage declared invalid and title to the land quieted in the Indian.

2. Whether a mortgage on land inherited by an Osage allottee, who had a certificate of competency, from a full-blood Osage allottee, to whom no certificate of competency had ever been issued, is invalid under Section 7 of the Act of April 18, 1912, because executed prior to adjudication of heirship and issuance of the order distributing the estate to the heir in proceedings for the probate of the deceased allottee's estate.

#### STATUTES INVOLVED

Sections 3, 6, and 7 of the Act of April 18, 1912, 37 Stat. 86, provide, in part, as follows:

SEC. 3. That the property of deceased  
 \* \* \* allottees of the Osage Tribe \* \* \*  
 shall, in probate matters, be subject to the  
 jurisdiction of the county courts of the  
 State of Oklahoma \* \* \*

SEC. 6. \* \* \* When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. \* \* \*

SEC. 7. That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: \* \* \*

#### STATEMENT

Mamie Fletcher Pitts, a full-blood Osage allottee, to whom no certificate of competency had been issued, died May 24, 1937, seized of land which had been allotted to her as a member of the Osage Tribe of Indians (R. 54). In proceedings for the probate of her estate duly instituted in the County Court of Osage County, Oklahoma, George Pitts, her husband, also a full-blood Osage allottee, was appointed administrator of her estate (R. 55). On July 12, 1937, he mortgaged the

land involved to Fred G. Drummond as security for the payment of a note for \$2,500.00, the mortgage being made without the approval of the Secretary of the Interior (R. 56). On June 24, 1938, the Secretary of the Interior revoked a certificate of competency which had been issued to George Pitts on July 11, 1910 (R. 55). On September 9, 1938, the County Court of Osage County entered its order adjudging George Pitts to be the sole heir of Mamie Pitts and directing the distribution of her estate to him (R. 55).

On October 24, 1939, Fred G. Drummond instituted an action against George Pitts in the District Court of Osage County to recover judgment on the note and for foreclosure of the mortgage. On February 9, 1940, a judgment foreclosing the mortgage was entered in that court in favor of Drummond. On May 6, 1941, the judgment was affirmed by the Supreme Court of Oklahoma. *Pitts v. Drummond*, 189 Okla. 574. On March 2, 1942, a petition for a writ of certiorari was denied by the Supreme Court of the United States. 315 U. S. 814. In this litigation, George Pitts was represented by a private attorney whose employment was approved by the Secretary of the Interior. The appeal to the Supreme Court of Oklahoma, the necessary supersedeas bond, and the consequent petition for certiorari to the Supreme Court of the United States were authorized and approved by the Secretary who likewise authorized

and approved the payment of the expenses of the litigation from the funds of George Pitts held by the Osage Indian Agency. The United States was not a party to this litigation, nor was the Indian's counsel authorized to appear for or represent the United States. (R. 56-57.)

On April 29, 1942, the United States brought this action on its own behalf and on behalf of George Pitts to cancel the mortgage and to quiet his title to the land involved, alleging that the mortgage was void under Section 7 of the Act of April 18, 1912, because made prior to the order of the probate court adjudging George Pitts to be the heir of Mamie Pitts and directing the distribution of her estate to him (R. 1-10). On September 4, 1943, the district court entered judgment in favor of Fred G. Drummond (R. 59). On August 1, 1944, the circuit court of appeals reversed the judgment (R. 90-91).

#### ARGUMENT

1. Both courts below properly rejected petitioner's contention (Br. 40-45) that the United States is bound by the state court adjudications in the foreclosure proceedings (R. 57, 86, 116, 119). *Bowling v. United States*, 233 U. S. 528; *Logan v. United States*; 58 F. (2d) 697 (C. C. A. 10); cf. *United States v. Hellard*, No. 648, October Term 1943. The United States was not a party to that proceeding, nor was it represented in any way.

The approval and authorization by the Secretary of the Interior of the various steps in the litigation was sought, by counsel chosen by Pitts, and granted (R. 53-54) only to insure payment of the expenses out of George Pitts' restricted funds in the hands of the Osage Indian Agency.<sup>1</sup>

2. Petitioner contends (Br. 15-21) that since George Pitts had a certificate of competency, Section 6 of the 1912 Act removed restrictions on alienation from the allotment he inherited from Mamie Pitts, and hence Section 7 of the 1912 Act is inapplicable to the mortgage here involved. In advancing this contention, petitioner seeks to draw support from *United States v. Mullendore*, 30 F. Supp. 13 (N. D. Okla.). But the *Mullendore* case involved a non-Osage heir, and in holding that Section 7 of the 1912 Act does not impose restrictions on land inherited by a non-Osage, the court said that the 1912 Act as a whole discloses "a purpose to protect Osage allottees and

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<sup>1</sup> The purpose, of petitioner's reference (Br. 12-13) to Section 4 of the Act of February 27, 1925, 43 Stat. 1008, 1011, and *United States v. Sards*, 94 F. (2d) 156 (C. C. A. 10), decided thereunder, is far from clear. If that Act imposes any obligation on the Secretary of the Interior, under the circumstances of this case, to pay George Pitts' "just indebtedness \* \* \* out of the income of such member, in addition to the quarterly income hereinbefore provided for," that obligation has no relation to the ruling of the court below that the mortgage foreclosed by petitioner was invalid. We are informed, moreover, that there is no income of George Pitts from which a payment directed by Section 4 could be made.



their Osage Indian heirs" but "no policy for the protection of non-members of the tribe". 30 F. Supp. at 15.

Petitioner's view is supported by *Pitts v. Drummond*, 189 Okla. 574, certiorari denied, 315 U. S. 814, in which the court held the mortgage here involved to be valid, but the Oklahoma court relied, in part, on the *Mullendore* case which, as we have shown, is distinguishable. It is further contended (Br. 23-34) that, since title and the right of immediate possession of Mamie Pitts' allotment devolved on George Pitts immediately upon Mamie's death, Section 7 does not apply because there is no occasion for possession of her allotment to be "turned over" to George Pitts by a probate court or administrator. This was one ground of the *Pitts v. Drummond* decision, *supra*, and the basis of the district court's decision herein. Both of these contentions are unsound and were properly rejected by the circuit court of appeals.

Respective fields of operation are assigned by the decision below to Sections 6 and 7 of the 1912 Act. While the former section removes restrictions on alienation from lands inherited by Osage Indians who have certificates of competency, the latter affords such Indians full protection against certain obligations, incurred during the period the land was restricted and for a limited time thereafter, which would otherwise be enforceable against their lands. The first sentence of Section 7 protects the lands, both allotted and



inherited, of Indians who receive certificates of competency, from forced sales in satisfaction of obligations incurred prior to the issuance of the certificates of competency; and the second sentence applies to the inherited lands of Indians who have certificates of competency, and prevents the taking of such lands to secure "the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs." Unless applicable to Indians who hold certificates of competency, the second sentence of Section 7 would be meaningless, for restricted Indians, of course, require no such protection. Rejection of petitioner's construction (Br. 31) of this sentence, which would limit its application to a prohibition against taking the lands while they are in the hands of the administrator, requires no more than a careful reading of the sentence. It is not only provided that the lands and money shall not be "taken or sold" for indebtedness incurred before they are "turned over" but also that they shall not be "subject to" such indebtedness.

The class of creditors from whom the second sentence protects the inherited lands of Osages who have certificates of competency becomes clear if the words "turned over" are construed, as they should be, in connection with Section 3 of the 1912 Act, which provides that: "The property of deceased \* \* \* allottees of the Osage Tribe \* \* \* shall, in probate matters, be subject to

the jurisdiction of the county courts of the State of Oklahoma." As the Oklahoma Supreme Court indicated in *Pitts v. Drummond*, 189 Okla. 574, 576, certiorari denied, 315 U. S. 814, while title to lands passes immediately on the death of an allottee to his heirs, the title of the heirs does not become absolute until the probate court has exercised its jurisdiction. *White House Lumber Co. v. Howard*, 142 Okla. 163; *Oil Well Supply Company v. Cremin*, 143 Okla. 57. Accordingly, estates of deceased allottees may reasonably be said to be "turned over" to the heirs, within the meaning of Section 7 once the probate court has determined the heirs and ordered distribution of the property to them. It would be absurd to construe the words "turned over" of the second sentence of Section 7 as having reference to the time the heir obtains the right of immediate possession. As the circuit court of appeals noted (R. 87), such a construction would mean that Congress intended to protect the unrestricted property of deceased allottees but not their restricted property which always descends, with the absolute right of immediate possession, immediately to the heirs. Moreover, the statute supplies no basis for such a construction but, on the contrary, argues against it. Section 7 of the 1912 Act does not deal in terms of possession. In substance, it provides that certain indebtedness may not affect the ownership by Osage heirs of inherited land. Therefore,

it is logical to suppose that the statute is concerned with the time when ownership, not possession, is "turned over."

#### CONCLUSION

This case was correctly decided by the circuit court of appeals. Although there is a conflict between the decision below and that of the Oklahoma Supreme Court in *Pitts v. Drummond*, 189 Okla. 574, certiorari denied, 315 U. S. 814, we submit that since the problem involved in these cases is localized and confined to the Osage Indians, and since the ruling of the court below on the construction of the federal statute will probably be regarded as controlling in state as well as federal courts, the petition for a writ of certiorari should be denied.

Respectfully,

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OCTOBER 1944.

